

UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF TEXAS  
HOUSTON DIVISION

EXXON MOBIL CORPORATION . C.A. NO. H-10-2386  
VS. . HOUSTON, TEXAS  
MAY 26, 2016  
UNITED STATES OF AMERICA . 2:00 P.M. to 2:51 P.M.

TRANSCRIPT of DISCOVERY HEARING  
BEFORE THE HONORABLE LEE H. ROSENTHAL  
UNITED STATES DISTRICT JUDGE

APPEARANCES:

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## P R O C E E D I N G S

*THE COURT:* Good afternoon. Thank you for participating in this.

So here is the question that I have as just a run-up to this: What is the status right now of the two cases in relationship to each either?

*MR. STEINWAY:* This is Dan Steinway, Baker Botts, for Exxon. The two cases, are you referring, Your Honor, to the CERCLA case and the contract case or the two consolidated cases before you, Your Honor, the --

*THE COURT:* The CERCLA and the contract.

*MR. STEINWAY:* Your Honor, I can answer. It's Dan Steinway again. Your Honor, the contract case was stayed by Judge Braden pending the resolution of a case currently before her in her court, *Shell Oil versus United States*. We are awaiting a decision from Judge Braden on the *Shell* case. Judge Braden did tell us that she will issue a decision in August, before the end of the term for her clerks, in the *Shell* contract case.

*THE COURT:* Okay.

*MR. ROWE:* And, Your Honor, good afternoon. This is Michael Rowe for the government. I agree with most of that, although I was just rereading the Judge's order this afternoon, and it appears to say that the stay is dependent on what happens in Your Honor's court. She refers to the Southern

1 District of the United States District Court of Texas and the  
2 Houston Division at the end of her order. It may be that she  
3 offered that in some subsequent conference, but I wasn't aware  
4 of that, if that's the case. In any event, the case is stayed.

5 *THE COURT:* So, we're not going to get any guidance  
6 out of there. If anything, it's going to come the opposite  
7 direction?

8 *MR. STEINWAY:* Your Honor, this is Dan Steinway again  
9 for Exxon. The way that we understood Judge Braden's order in  
10 the contract case is that once the *Shell* decision was issued by  
11 the Court in that case, she would reconsider her decision to  
12 lift the stay in the *Exxon* case. And, again, as I mentioned to  
13 you earlier, Your Honor, we believe the Court's going to issue  
14 a decision in the *Shell* case in August.

15 *THE COURT:* Okay. Good. Okay. Let's try to take up  
16 the disputes here and not so much the extension deadline, but  
17 the substantive response issue, the adequacy of the response.  
18 And I'm happy to hear first from the party asserting that the  
19 response is inadequate.

20 *MR. ROWE:* Yes, Your Honor. It's Michael Rowe. And  
21 that would be the government. And I will tell you that I think  
22 both Mr. Steinway and I are sorry to be here. We have managed  
23 to resolve many similar disputes in the past, but this one we  
24 seem not to be able to get past.

25 We do, however, agree about what the dispute is

1 about. From our point of view, the company has failed to  
2 answer the core questions in our entire first round of  
3 discovery, but we agree amongst the parties that there  
4 basically are three topics. Not to say that there are not  
5 other small issues, but these are by far the dominant ones.

6           The first one is the company's declining to  
7 respond at least for the time being to any and all questions  
8 relating to the company's efforts, if there are any, to comply  
9 with the national contingency plan, which, as Your Honor may  
10 know from prior CERCLA experiences, is an element of their case  
11 and is an issue that the parties reserved with the Court's  
12 permission for Phase II, which is why we're asking the  
13 questions now.

14           So, we're not able to get any information about  
15 the NCP. And that -- I will hint a little bit at where we're  
16 going. I'll tell you that it seems to be the company's  
17 position, that that is a question only for experts. So we have  
18 to come back to that in a minute.

19           And the two remaining topics are in some sense  
20 related. They're what we have come to call between us the  
21 collateral source issues. It is certainly the government's  
22 position and we have a fair amount of authority for the  
23 prospect, that the collateral source rule does not apply in  
24 CERCLA cases. And so we have asked the company for information  
25 about portions of its insurance recovery that relate to the two

1 refineries from a number of pieces of insurance litigation,  
2 which they admit they made some recovery, but where they are  
3 thus far refusing even to inquire as to how much work it would  
4 be to go back into what's called the -- their first insurance  
5 case out of California was the North American coverage case,  
6 and they have a thing called the NACC repository, which we've  
7 asked them to look in for documents.

8           We also think there might be some documents, by  
9 the way, that might be responsive to Phase I discovery in  
10 there, we don't know, but that's not really the issue right  
11 now.

12           So the question is if the collateral source rule  
13 does not, in fact, apply and if they made a 260 million --  
14 \$269 million recovery, as they say, and keeping in mind that  
15 they were also suing about things that we acknowledge have  
16 nothing to do with the case, how much of that recovery might  
17 the Court consider as an equitable factor when you're  
18 allocating as we get to the next phase of the case.

19           The third item is similar. You may remember in  
20 your earlier opinion, that you mentioned the *Lockheed*  
21 litigation before Judge Huvelle --

22           *THE COURT:* Uh-huh.

23           *MR. ROWE:* -- the issue about whether or not large  
24 corporations with government contracts are effectively  
25 recovering response costs as part of their -- essentially an

1 overhead pool. That issue is currently still pending before  
2 the D.C. Circuit. And, again, we have asked for information.

3           There Exxon's response -- we've kind of gone back  
4 and forth a little bit. We were first told that we would get  
5 an answer to those questions and that the company believed they  
6 didn't have any contracts that would bring that issue into the  
7 case. When the responses were served, we got instead  
8 objections and declinations to answer; but then in our  
9 post-service discussions, Mr. Steinway agreed that the company  
10 needed to respond to those. So we don't -- I'm not sure where  
11 we are on that right now. My understanding is that they intend  
12 to do that at some point, but they haven't yet.

13           And I'll go just a little more and then stop.  
14 The problem for us and the reason I think you're right to know  
15 that this is much more important than the issue of the time for  
16 experts, is that our experts to some degree are dependent on  
17 the answers to these questions. So I have an environmental  
18 engineer who is prepared to opine about the company's efforts  
19 to comply with the NCP and whether they're adequate on the  
20 various projects that Exxon may choose to define or however  
21 they decide to group their various costs.

22           And it's -- it is possible, you know, we can look  
23 at the last three years of work they've done and try to make  
24 our own judgments about what those projects logically are and  
25 whether they're removal or remedial actions and whether they

1 did what they were supposed to do or not. But almost  
2 inevitably their experts will group them some different way,  
3 and we wind up with a rather haphazard presentation to the  
4 Court.

5           So, it's difficult -- it's much more difficult  
6 for our experts if Exxon hasn't taken some sort of position at  
7 least about what these projects are, which ones go together,  
8 which ones they think are removal, which ones they think are  
9 remedial, and how they think they complied, if they did, or if  
10 they think they did, than it is -- so if you get that, as an  
11 expert, at least you have a set of materials to work on.  
12 Without it, you're really left at sea and we're likely to have  
13 a good bit of chaos in the exchange of presentations.

14           A similar problem arises with respect to the  
15 accounting material, because one of the things that we have  
16 asked our accountant -- and those are the two experts, by the  
17 way, environmental engineering and accounting, that we're  
18 planning to offer. The accountant is, of course, looking at  
19 invoices and proof of payment and all of the usual sorts of  
20 things, but was also assigned when we hired him back around the  
21 holiday, the task of looking at the information relating to  
22 these other sources of payment that may have resulted in an as  
23 yet unknown amount of recovery for the company. And at this  
24 point he literally has nothing to work with, because we don't  
25 have any information about either one of these things. Now,

1 those are things that can be fixed, but that's our problem.

2                   So what we're looking for is basically to have  
3 our questions answered and to have some attempt by Exxon to at  
4 least go and look at the NACC repository and determine what the  
5 burden would be of answering our questions, some of which are  
6 as simple as asking for interrogatory answers, some of which,  
7 admittedly, could be more burdensome, but we don't know how  
8 much until we get some information about how the information is  
9 stored. As of the Friday before I sent the --

10           *THE COURT:* And what specific information in that  
11 respect do you need?

12           *MR. ROWE:* Well, we need to have some understanding of  
13 how Exxon calculated the figures that it has told us were the  
14 approximate demand at the outset of the insurance case, and we  
15 need to have some sort of motion that would allow us to make  
16 some kind of arguments to Your Honor about how the recovery  
17 should be allocated. And I can expand a bit --

18           *THE COURT:* Well, hang on. Two separate issues.

19           *MR. ROWE:* Okay.

20           *THE COURT:* So, let's focus on the insurance issue  
21 first. There's no issue here that Exxon is going to be  
22 judgment proof, I take it, or unable to respond in damages?

23           *MR. ROWE:* I'm sorry? I beg your pardon?

24           *THE COURT:* There's no issue as to Exxon's ability to  
25 respond in damages, is there?

1           *MR. BUTHOD:* Not that I'm aware, Judge. This is Ty  
2 Buthod for Exxon.

3           *MR. ROWE:* I believe that Exxon has the money.

4           *THE COURT:* Right.

5           *MR. ROWE:* I'm not sure I understand the question,  
6 Your Honor, but I think the answer is "no."

7           *THE COURT:* Exactly. And you also know -- and you've  
8 been given copies of some of the policies, as I understand it;  
9 is that correct?

10          *MR. ROWE:* We have been given partial copies of three  
11 or four policies with all of the insurers and policy numbers  
12 redacted.

13          *THE COURT:* Okay. So this is sounding good. What  
14 more do you need with respect to that kind of proof?

15          *MR. ROWE:* Well, the simplest way for me to explain  
16 this, Your Honor, is to talk a little bit about what the cases  
17 say.

18          *THE COURT:* Well, no, no, no. Cases are fact  
19 dependent. What I really need to know is what benefit the  
20 additional discovery on insurance will provide that you cannot  
21 obtain or have not already obtained from discovery that has  
22 occurred so far.

23          *MR. ROWE:* Okay.

24          *THE COURT:* Okay? It's not a jurisprudence question,  
25 so much as a practical fact-bound question, necessary to

1 determine proportionality in specific ways.

2           *MR. ROWE:* Okay. Let me try to do it this way --

3           *THE COURT:* It's not just relevance now. It's  
4 proportionality.

5           *MR. ROWE:* Yes, ma'am, I understand.

6           *THE COURT:* And you know that better than I do.

7           *MR. ROWE:* Yes, ma'am. Exxon has --

8           *THE COURT:* You've got to tell me louder though.

9           *MR. ROWE:* Oh, I'm sorry.

10          *THE COURT:* That's okay.

11          *MR. ROWE:* I'll bring the phone a little closer.

12          *THE COURT:* Don't apologize, just increase volume.

13          *MR. ROWE:* Okay. Exxon has the represented to the  
14 United States --

15          *THE COURT:* Louder. I don't know if you're on the  
16 speaker or if you're at the bottom of the tunnel or what.

17          *MR. ROWE:* Let me turn this. How about now, is that  
18 better?

19          *THE COURT:* Nope.

20          *MR. ROWE:* Okay.

21          *THE COURT:* Pick up the phone and talk into the thing  
22 called a mouthpiece.

23          *MR. ROWE:* Unfortunately, it's one of these fancy  
24 conference phones, Your Honor, that's supposed to make that  
25 unnecessary.

1           *THE COURT:* Then get on top of it.

2           *MR. ROWE:* Okay. I am directly on top of it now.

3           *THE COURT:* Better. Okay. And we increased volume  
4 here. So I think we're going to be -- together, we'll be  
5 adequate. Go ahead.

6           *MR. ROWE:* Okay. I will try to speak as loudly as I  
7 can, without yelling.

8           *THE COURT:* You're doing good.

9           *MR. ROWE:* Exxon has represented to the government  
10 that it brought a large elaborate insurance claim against  
11 dozens of insurance companies covering decades of potential  
12 liability. Portions of those insurance claims appear to  
13 include policies from World War II, which we believe the United  
14 States or the taxpayers paid the premiums on, either directly  
15 or indirectly, and so logically some portion of that, since the  
16 collateral source rule does not apply, would be applied against  
17 the cost that Exxon is claiming in response for this case. The  
18 question is, how much.

19           Well, possible answers are -- and this is the  
20 only reason why I was going to the jurisprudence. One, that  
21 they would have to have allocated that in the insurance claim,  
22 or we would take the entire 269 million that they represent  
23 that they recovered and apply it to this case. The Tenth  
24 Circuit actually did that. A number of courts in subsequent  
25 cases have not done that. And the ways in which they have not

1 done that involved things like policy limits, looking at the  
2 number of sites that were present in the case and trying to  
3 make some judgment about how much insurance applied to one or  
4 the other and all the kinds of things you would expect to do if  
5 you were trying to make an equitable determination about how  
6 much of a sum of money should be applied in the group of costs.

7           It's not an easy thing to do here. We  
8 acknowledge that. We are not claiming as yet that it is a  
9 major issue in the case. We can't determine how significant it  
10 is because Exxon has declined to tell us at present how it  
11 calculated all these numbers that it represents are  
12 approximations of the dollar figures that it claimed,  
13 recovered, and so forth, and we know nothing about what  
14 happened in the ensuing ten years of litigation, so we don't  
15 know whether the 3500 gas stations that they keep referring to  
16 were -- those claims were successful or unsuccessful and we  
17 don't know what that says about the amount of money they  
18 recovered for the refineries and so forth.

19           So our problem is we have no raw material from  
20 which to assemble arguments on which perhaps the parties are  
21 able to agree as to what sum of money it would be appropriate  
22 to subtract from the 60 plus million dollars that we're talking  
23 about here as a result of reimbursement by insurer. We're not  
24 looking for lots of information about the insurance claims.  
25 We're trying to figure out what went on with the refineries and

1 what portions of the recovery logically relates to the  
2 refineries or if we have to reconstruct that after the fact,  
3 some reasonable way to do so.

4           *THE COURT:* All right. Let me have a response to that  
5 argument, because there's a -- that is not an insignificant  
6 basis for requiring production of at least a limited amount of  
7 information, and we can talk about what those limits might look  
8 like.

9           *MR. BUTHOD:* Judge, this is Ty Buthod for ExxonMobil.  
10 I'll say fundamentally, we do have a very real difference of  
11 opinion about what the law would be regarding the collateral  
12 source rule under CERCLA cases, et cetera. We certainly  
13 recognize there's a lot of law indicating that the collateral  
14 source rule does not apply. However, we do believe that with  
15 the presence of a contract action as well where they -- we  
16 would argue the government indemnified Exxon, there may be a  
17 basis later down the road, either in this case or in  
18 Washington, to assert that among the other equitable factors to  
19 be considered, the sort of black letter rule that the  
20 collateral source rule doesn't apply may not apply to this  
21 case. That's not today's fight. I just want to sort of put a  
22 placeholder out there to say we don't readily concede that it  
23 would not apply.

24           But I think the fundamental difference we have  
25 is, the notion we're hearing from the government is because the

1 collateral source rule doesn't apply, the government is  
2 entitled to sort of a first dollar credit for any kind of  
3 insurance proceeds. And that's where we fundamentally differ.  
4 What CERCLA case law tells us, is that a plaintiff is not  
5 entitled to double recovery, which we recognize and don't  
6 quarrel with. However, we don't believe you even need to get  
7 to that, Judge. Because there's not going to be a circumstance  
8 in which Exxon would recover both from an insurer and from the  
9 government for some amount that exceeds a hundred percent of  
10 its costs. We'll never get anywhere near that.

11           So, I will just say, before we get into the  
12 details of what the government is seeking, we disagree with the  
13 notion that the significant burden that may be associated with  
14 going to produce this material from the so-called NACC, that  
15 is, the coverage litigation that ExxonMobil had, we disagree  
16 that the burden associated with that is at all proportional to  
17 whatever benefit that could arise in this case, because we  
18 don't think we would ever get to a point where there would be a  
19 credit, so to speak, because we're never going to be at risk of  
20 experiencing a double recovery.

21           So when you think of the factors at issue, we  
22 don't think the importance of this discovery is there. We  
23 don't think there's a risk of double recovery here. And we  
24 absolutely feel like there is significant burden that's being  
25 thought to be imposed upon ExxonMobil, to go back and produce

1 material from the NACC litigation in excess of the 374,000  
2 pages of deposition transcripts, exhibits, trial exhibits, et  
3 cetera, that the government has had from us for about a period  
4 of three years.

5 *THE COURT:* Okay. So, let's talk about the specific  
6 categories of requested discovery and what is the most and the  
7 least burdensome. Let's start with the least burdensome.

8 *MR. ROWE:* Your Honor, Mike Rowe. If I might just  
9 take a quick moment, because I think that was a fair summary of  
10 Exxon's position. I would say to you with respect to the issue  
11 of set-off, there is also a difference of opinion about that.  
12 I'm aware that there is one case in which the Court said that  
13 the collateral source rule did not apply and proceeded to  
14 determine that since the plaintiff in contribution, in effect,  
15 had not made a profit, that they would not take that into  
16 account. There are also multiple cases in which courts applied  
17 the lack of a collateral source rule much more typically to  
18 simply to take off the top the money from the insurance  
19 recovery. So, again, that's a legal issue that's in dispute.

20 I'm going to speak to burden, because that's what  
21 you asked, and then I'll come back to the 300,000 pages. I  
22 don't know what to tell you about the burden, because I do not  
23 believe the company has made an inquiry about the way the  
24 material is stored sufficient to make a burden argument.

25 *THE COURT:* Then I really can't rule unless I find

1 that it is simply irrelevant. I can't rule on proportionality.

2           *MR. ROWE:* I think I might be forced to agree with  
3 you, although I think there are solutions for that problem.  
4 All I can tell you is, that the Friday before we wrote the  
5 letter to you, when we were talking about this, I asked if this  
6 case -- if the insurance case that was happening during the  
7 1990s, whether the material was stored physically or  
8 electronically, and I was told that the lawyers I was talking  
9 to did not know. And I also subsequently had a conversation  
10 just before I sent you a letter, in which I was told, they did  
11 not know what was in the index or finding aids to that  
12 repository; they did not know whether there were indexes or  
13 finding aids; they did not know what was in the repository;  
14 but, nevertheless, I was on a wild goose chase. And it was at  
15 that point that I came --

16           *THE COURT:* Wild goose chase because there wasn't  
17 going to be anything there or it wasn't worth looking?

18           *MR. ROWE:* Yes, I think.

19           *THE COURT:* Why?

20           *MR. ROWE:* Were you asking me?

21           *THE COURT:* Yes. What were their reasons for saying  
22 that it was irrelevant or wild goose?

23           *MR. ROWE:* Well, I think, roughly, you just heard them  
24 from Exxon's counsel, but I do not believe I can answer that  
25 question for you.

1           *THE COURT:* Okay. That's a fair response.

2           *MR. BUTHOD:* If I may, Judge. Ty Buthod, again, for  
3 ExxonMobil. We know there is a NACC -- and that's the acronym  
4 NACC that you will see. There is a NACC database. There's  
5 one that we got from the counsel who represented the company in  
6 the insurance coverage litigation that we produced three years  
7 ago to the --

8           *THE COURT:* And describe to me, without being overly  
9 detailed, what information that provides that --

10          *MR. BUTHOD:* Well, I can tell you what I know it  
11 provides. It provides the deposition transcripts of witnesses  
12 who testified in the NACC litigation. It provides exhibits to  
13 every deposition that's provided therein. And it provides a  
14 large set -- as the Court's well-aware, lawyers tend to  
15 over-include when they come up with their trial exhibits. And  
16 what's described as trial exhibits is basically an exceedingly,  
17 exceedingly large volume of exhibits that were collected by the  
18 company of over 3500 sites that were subject to the NACC  
19 recovery litigation. It is no doubt a very, very large volume  
20 of material.

21                 Now, to answer the Court's prior question about  
22 what's most onerous, what's least onerous, et cetera, I fully  
23 recognize that today on this call, I will absolutely concur  
24 that it would be difficult to address the burden issue standing  
25 alone, and I'll confess, Judge, I've always perceived these

1 calls to be in a sense kind of a screening function to see  
2 whether the Court really needs to entertain briefing on a  
3 discovery fight or whether it's one of the vast majority of  
4 discovery fights where frankly the parties ought to just be  
5 able to put their heads together with a little guidance from  
6 the Court and then get on to things that are more important.  
7 So, you know --

8           *THE COURT:* Well, there is that advantage. And I  
9 guess that goes to the combined issues of benefit and burden.  
10 How hard is this stuff to get; can we narrow the request to  
11 provide what is most useful to the plaintiff, without it  
12 imposing as much of a burden; and if so, what is going to be  
13 the greatest benefit to the plaintiff?

14           *MR. BUTHOD:* Or to the defendant, I guess I would say,  
15 Judge. But, yes, I understand the Court's comments precisely.  
16 What I would offer is, while counsel has represented to the  
17 Court that it's time to ask narrow questions, the requests for  
18 production that we had to respond to, that they've never  
19 indicated, as far as I'm aware, they've never indicated any  
20 willingness to recast or more narrowly tailor. You know,  
21 Request for Production No. 1 says, "All communications between  
22 the company and any insurer or any representative of any  
23 insurer relating to any claim relating to the Baytown or Baton  
24 Rouge sites."

25                       Well, I would actually submit something like that

1 as a matter of law, without me getting an affidavit, the Court  
2 would look at that and say, "Well, that's just too broad. You  
3 don't have to answer that." So, I mean, the reason we did find  
4 ourselves unable to reach a resolution about this, is the  
5 defendant -- the government has declined to try to narrowly  
6 tailor the requests to something that's even colorably related  
7 to something we still don't think is --

8           *THE COURT:* Okay. Lose the rhetoric. Lose the  
9 rhetoric. Okay?

10           *MR. BUTHOD:* Okay.

11           *THE COURT:* I need to know what could be done to  
12 narrow the requests on behalf of the government to focus on  
13 what is going to be at least at the outset the most valuable  
14 information that you need. That's what I'm looking for. It's  
15 a very practical question.

16           *MR. ROWE:* Your Honor, Mike Rowe again. The  
17 government -- a couple of quick things. One, we are certainly  
18 willing -- we're not looking, obviously, for information about  
19 the 3500 gas stations. We are certainly willing to look at  
20 options, if we had some information about what was in the  
21 repository and how it was stored, about how we might narrow the  
22 request.

23           *THE COURT:* No, no, no. You don't need to know what  
24 they've got to narrow your request about what you want. It  
25 might be helpful, but can you narrow your request, knowing what

1 you know now, about what you want?

2           *MR. ROWE:* Oh, plausibly. I would say to the Court,  
3 that we tried to keep all of our requests confined to the two  
4 refineries, that to some degree we need to know about insurance  
5 claims for those refineries later on, because we have to do an  
6 allocation between recoveries that might be for, you know,  
7 liter gasoline during the Sixties instead of World War II and  
8 that sort of thing. But I'm sure that we could work together  
9 to try to narrow these things.

10           My counterpoint to counsel's broad question would  
11 be that we asked them to see their discovery responses related  
12 to the refineries and the insurance case, something I would  
13 expect to find in a pleadings file in that repository, and we  
14 have not gotten an answer.

15           I should speak briefly to the 300,000 pages,  
16 because you need to understand what we did and did not get and  
17 where it came from. That production came about during a  
18 discussion between the parties in Phase I, about whether the  
19 group of issues now before the Court is a Phase I or Phase II  
20 issue. During the discussions, the government discovered that  
21 lawyers in a later insurance case had made a demand on Exxon  
22 for materials from a prior insurance case and that they were  
23 contained on a group of CDs. The sum total burden of  
24 production of those for Exxon was burning a set of CDs for us.  
25 And I don't know whether I was just learning things on the

1 phone a little while ago, but I have specifically asked whether  
2 we got all of the depositions, and I was told, we didn't know.  
3 I don't know -- we got a lot of material. Because the  
4 insurance case does not specifically relate to the CERCLA case,  
5 a lot of it is not terribly useful. Some of it definitely is.  
6 The problem is, I don't know what I've got and I don't know  
7 what I haven't got. So that's the problem with the 300,000  
8 pages.

9           And we are busily looking through it, and some of  
10 it is useful. We have at least one deposition in that material  
11 from a witness that Exxon has already offered as an expert in  
12 this case. So it's not like we're not paying attention to it.

13           So, you know, one of the things that we offered  
14 to do in our discussions was we had a pair of requests relating  
15 to -- there are three sets of insurance cases. The NACC is the  
16 one that's most likely to apply to our case. And then there's  
17 a case that involved a bunch of Mobil refineries, and then  
18 there's a personal injury case with asbestos in New York. We  
19 believe we have good reasons for asking for some information  
20 from all of those, but we agree that the NACC case and that  
21 repository is undoubtedly the core, and so we offered to at  
22 least respond to any efforts to answer to those, because maybe  
23 we're going to get what we need from the questions, which we  
24 tried to limit, from the NACC case.

25           So, you know, we're certainly willing to continue

1 to have a discussion like that, but it would certainly help us  
2 to know, for example, whether there are files in that  
3 repository that pertain to the claims relating to these  
4 refineries and the policies and insurers that were attached to  
5 them, because there appear to be a whole bunch of separate  
6 settlements here. So if it turns out that the material is  
7 stored in a way that facilitates to our narrowing the inquiry  
8 in that sort of way, I'm sure we would be happy to consider  
9 that. Right now we don't know.

10           *MR. BUTHOD:* And, Judge, Ty Buthod for Exxon again. I  
11 would merely suggest that counsel's suggestions sort of puts  
12 the cart before the horse. I mean, maybe the right approach is  
13 for counsel to identify a request that would be limited to the  
14 purposes he's articulated, that is, trying to ascertain whether  
15 there's some sort of insurance proceeds that admittedly we  
16 think he's not entitled to, he thinks he's entitled to by way  
17 of off-set or credit or what have you. And while we disagree  
18 on that legal issue, we recognize the difference between  
19 discoverability and admissibility. So, I don't want to quarrel  
20 with that.

21           But I don't think that it's incumbent upon the  
22 opposing party to identify what they have so that then the  
23 narrowly tailored requests can come. I think the requests  
24 should really be limited to what could even colorably be  
25 discoverable, and then let's see whether we can meet that

1 request.

2           *MR. STEINWAY:* Your Honor, this is Dan Steinway from  
3 Exxon as well. To supplement what Mr. Buthod has just said,  
4 we -- Exxon has already produced to the government in Phase I a  
5 substantial cost expert report, which includes a lot of  
6 invoices. And Mr. Rowe has talked about the need to  
7 substantiate the numbers with respect to the insurance claim.  
8 Exxon would submit, Your Honor, that a lot of the information  
9 that the government needs is already included in the exhibits  
10 to the expert's report included in Phase I. That information,  
11 Your Honor, would go a long way to help substantiate the kinds  
12 of numbers that, frankly, the government and Exxon have been  
13 talking about to try to stipulate to some kind of a decision in  
14 this matter.

15           *THE COURT:* Why doesn't that make sense as a first  
16 exploration?

17           *MR. ROWE:* Your Honor, my answer to that is I'm not  
18 sure I even understand what I'm being told. It is true that  
19 Exxon has produced cost sets to us and then they reproduced  
20 them in December and updated them for some Bates number  
21 problems in January, and that's the raw material my accountant  
22 is looking at. It is true that my accountant is examining  
23 those documents to see whether there are invoices and proof of  
24 payment.

25                           I'm continually told that they somehow relate to

1 the calculations that Exxon made to make the approximations of  
2 the demand for each refinery in the insurance cases and that  
3 somehow the information is there. But I'm never told how the  
4 calculation was made, what estimate was done, how these things  
5 all fit together. And those questions are in our discovery.  
6 So if Exxon is prepared to tell us how they made those  
7 estimates, you know, then that might be a place to start.

8 *THE COURT:* Are there documents that set that out?

9 *MR. ROWE:* Not that my accountant people tell me that  
10 they can find.

11 *MR. STEINWAY:* Your Honor, Dan --

12 *MR. ROWE:* And that --

13 *THE COURT:* Who's talking? Who's talking?

14 *MR. ROWE:* I'm sorry, Your Honor. Mike Rowe --

15 *MR. STEINWAY:* Dan Steinway, ExxonMobil --

16 *THE COURT:* One at a time, and tell me who you are.

17 *MR. STEINWAY:* I apologize, Your Honor. It's Dan  
18 Steinway, Baker Botts, for Exxon.

19 We have provided to the -- we've had discussions  
20 with the government, Your Honor, over how those numbers were  
21 calculated, and Exxon is fully committed to try to explain to  
22 the government just as much as we can how those insurance  
23 calculations were made and the basis for these analyses. And  
24 the documents that we've given, Your Honor, to the government  
25 in the first phase would tend to supplement and, in fact, would

1 confirm pretty closely. I would admit, Your Honor, it may not  
2 get down to the precise cent of each particular clean-up item,  
3 but it would get very, very close to the kinds of numbers that  
4 we have suggested to the government are involved in these  
5 insurance calculations. And we would maintain, Your Honor, I  
6 apologize for repeating this, that those invoices, if properly  
7 calculated by the government's experts, should provide the  
8 government with the kind of substantiation and information that  
9 they need to satisfy their questions.

10           *MR. HEMINGER:* Your Honor, this is Justin Heminger for  
11 the government.

12           I just wanted to respond to what I think  
13 Mr. Steinway is saying. I believe what he's saying is that the  
14 invoices that Exxon has produced, if we add those up, that  
15 those relate to the initial amounts that Exxon says that it's  
16 paid in the insurance cases. And I guess what I wanted to  
17 emphasize is that our -- a lot of our discovery that we're  
18 doing -- or that we submitted was directed towards  
19 understanding how much Exxon finally recovered in the insurance  
20 cases and how that relates to the two refineries.

21           So we certainly have the invoices for their  
22 costs, but we don't have the settlement communications, as far  
23 as we know, between Exxon and its insurers to tell us where  
24 those hours actually ended up.

25           *MR. STEINWAY:* Your Honor, Dan Steinway replying to

1 the government on that point. We have given them, as  
2 Mr. Buthod mentioned earlier, several models of the  
3 settlements. To the best of our ability already, we've given  
4 the government four model settlements redacted for  
5 confidentiality reasons, but surely sufficient to give the  
6 government all the information that Exxon has with respect to  
7 how these insurance proceeds were distributed. That's been  
8 given to the government already. So the answer to the  
9 government's question, we have given them the settlement  
10 information and we've given them -- there were 200 policies at  
11 issue, Your Honor, in the insurance coverage litigation, and we  
12 started with giving the government one as a model and we've  
13 given them two and then we've given them three and four. And  
14 we tried to give them a model on these policies. And that is  
15 what the government has asked for, and we tried to give it to  
16 them.

17 *MR. ROWE:* Your Honor, Mike Rowe again, I'm sorry, and  
18 then -- and maybe then we can stop and hear what the Court has  
19 to say. But I just don't know what to make of some of that.  
20 We have been provided with four, of dozens of insurance  
21 settlements, that are heavily redacted for relevant  
22 information. And I believe we were offered them primarily as  
23 evidence that the company did not affirmatively allocate the  
24 proceeds at the time of discovery. And I think we're prepared  
25 to accept Exxon's representation on that point, probably even

1 without the policies. But we are missing lots of information  
2 that we would need in order to make any argument to the Court  
3 at all about how you ought to after the fact allocate those  
4 proceeds. It's much like allocation, there are different ways  
5 to do it, but we need some sort of raw material on which to do  
6 it, and right now we believe we have none.

7           *THE COURT:* I'm still not confident that I understand  
8 what raw material Exxon has reasonable access to that would  
9 shed light on just what you've described.

10           *MR. ROWE:* Okay.

11           *THE COURT:* That's where I'm -- I think my hole in the  
12 understanding is.

13           *MR. ROWE:* Okay. It's Mike Rowe again, Your Honor.

14           *THE COURT:* And I apologize if I'm making you repeat,  
15 but I'm just not connecting those dots yet.

16           *MR. ROWE:* No, I don't think you're making me repeat.  
17 You're asking me a question that is somewhat hypothetical given  
18 what I don't know right now, but I think I can give you some  
19 examples of the kind of material that might be relevant.

20                   Often in insurance cases, particularly these big  
21 elaborate insurance cases, people do what are called coverage  
22 charts. And that's where we lay out all the claims and the  
23 reinsurance and the supplemental insurance and what insurance  
24 companies paid off, parts of their liability to another  
25 insurance company, and you could line those up and see what the

1 claims were with respect to the refineries, who the insurers  
2 were and then perhaps we could go and look at those settlements  
3 and the related information to try to figure something out.

4           If there is information about the settlement  
5 negotiations, we might well be able to figure out which claims  
6 the parties agreed were not terribly meritorious, even though  
7 no one is going to flat-out say that, and we would have some  
8 idea whether the fortunes of claims for the refineries waxed or  
9 waned relative to claims for all of the gas stations. If there  
10 were any internal informal allocations of proceeds, it would  
11 obviously be useful to see those.

12           You know, there are lots of different ways to do  
13 it. It would be interesting to know within the refineries what  
14 the insurance companies believed the merits of the claims were  
15 to --

16           *THE COURT:* Okay. Look, interesting to know is not a  
17 recognized test.

18           *MR. ROWE:* I understand.

19           *THE COURT:* So coverage charts, to the extent that  
20 would have been a feature of the litigation that occurred at  
21 that time. What's another specific thing that would be  
22 relevant and proportional, that is, really beneficial to  
23 understanding the theories of liability or defense?

24           *MR. ROWE:* Your Honor, I will admit --

25           *THE COURT:* I can't hear. I'm sorry.

1           *MR. ROWE:* I'm sorry. It's Mike Rowe again.

2           And I will admit that it is somewhat difficult  
3 for me to name other specific things I would like to see  
4 without -- while I know almost nothing about how the insurance  
5 claims went. I guess I can give you one more, which is in our  
6 case we have supplemental cost claims offered as recently as  
7 December of last year. At present we do not know whether that  
8 happened in the insurance cases or not. So that would be  
9 interesting, and maybe --

10           *THE COURT:* Supplemental cost?

11           *MR. ROWE:* Claims. So, costs were updated as the  
12 company spent more money.

13           *THE COURT:* Got it. Okay.

14           *MR. ROWE:* We would like to know about how the  
15 settlements dealt with future costs. We understand from the  
16 ones we have, that are supposed to be models, that the claim  
17 was settled for occurrences through a certain date, but we  
18 don't know whether there's any obligation at this point for  
19 there to be some supplemental payment if the costs rise in the  
20 future or if the money that was paid is all.

21           And, lastly, the company estimates that it spent  
22 \$69 million over the course of litigation on its attorneys, but  
23 we have -- and I'm not claiming that I need, you know, all  
24 the --

25           *THE COURT:* It seems to me this is a little premature.

1           *MR. ROWE:* Okay.

2           *THE COURT:* Okay. So what I would propose is that we  
3 do this: Number one, to the extent Exxon has offered it, and  
4 it seems to have done so robustly, to sit down and walk through  
5 some of the practices used, fine, that should occur. We've now  
6 identified three specific categories of information that would  
7 be beneficial to the government to understand with more  
8 precision what insurance was done in ways that would have a  
9 bearing on the allocation issues. One is any coverage charts  
10 for insurance claims that have been paid out; two, supplemental  
11 cost claims; and, three, provisions about future claims.  
12 Right?

13           *MR. BUTHOD:* Ty Buthod for Exxon. That's my  
14 understanding.

15           *THE COURT:* All right. It seems to me that Exxon now  
16 needs to go back to Exxon and find out if such documents exist  
17 and if so, how far -- how hard they are to locate and retrieve.

18           *MR. STEINWAY:* Your Honor, Dan Steinway for Exxon. If  
19 I may say something. On the future claims issue, Your Honor,  
20 typically all the insurance coverage settlements clearly  
21 address the scope of whether or not there's a future claim. So  
22 I would submit, the government, we've already given them the  
23 settlement agreements. They would already address the issue of  
24 our future responsibilities as a part of the settlement of  
25 those claims. So that information would already be readily

1 available to the government.

2 *THE COURT:* Response?

3 *MR. ROWE:* Your Honor, I am willing to take another  
4 look at that. That was not entirely my understanding, but we  
5 can take a look.

6 *THE COURT:* Take a look.

7 *MR. ROWE:* If I might add to the list, it would be  
8 very helpful for us to have -- I know this is up to Your Honor  
9 whether you're willing to do this or not obviously -- the  
10 written discovery from the insurance case and an indication as  
11 to whether the depositions in the material I have already been  
12 provided is complete or not.

13 *THE COURT:* That's fine. I don't have a problem with  
14 that.

15 *MR. BUTHOD:* Judge, Ty --

16 *MR. STEINWAY:* Your Honor --

17 *MR. BUTHOD:* -- Buthod for --

18 *MR. STEINWAY:* Go ahead, Ty.

19 *MR. BUTHOD:* If I may. Sorry, Judge. Ty Buthod for  
20 Exxon. I'm happy to make that second inquiry and identify  
21 whether we know that that's complete or not. And, of course,  
22 I'll let Mr. Rowe know that.

23 As to written discovery, I know that's easily  
24 requested, but bear in mind, this was litigation with over 200  
25 defendant insurers. And before I just readily agree that we

1 can go get all that and make it available to him, I will  
2 suggest that on some level, that's going to hit a point of what  
3 I'm going to call diminishing returns and the Federal Rules are  
4 going to call it proportionality. And so I'll look into what  
5 we have there and let Mr. Rowe know, but I think that's of a  
6 different category than the three things the Court has already  
7 identified.

8           *MR. ROWE:* Your Honor, I to some degree will save you  
9 the trouble on that one. It's Mike Rowe. I take the point,  
10 and I don't completely disagree with it. I think we have to  
11 look and see what's there. Obviously we're interested in the  
12 discovery about issues pertaining to the refineries, not all  
13 the gas stations and the other things that went on. So I  
14 suspect we would be able to work that out.

15           *THE COURT:* All right. Let's start with the points  
16 that I've identified. And you can come back in 30 days, if  
17 that's enough time, and let me know if that is sufficient  
18 movement towards the goal or if more is needed.

19           *MR. ROWE:* Your Honor, I'm sorry, it's Mike Rowe. And  
20 I think that's a fine plan for the portions we've talked about.  
21 We have a few -- obviously the insurance issue is the core of  
22 our dispute.

23           *THE COURT:* Right.

24           *MR. ROWE:* We do have a couple of other issues. I  
25 have an expert trying to work on the NCP issues.

1           *THE COURT:* All right. Well, let's take those up, and  
2 then I think we can declare this conference successfully and  
3 overly lengthily concluded.

4           *MR. ROWE:* Very well. Okay. So it's Mike Rowe again.  
5 And you may remember from before that --

6           *THE COURT:* I've got it.

7           *MR. ROWE:* -- we asked Exxon to tell us about its  
8 efforts to comply with the NCP. There are -- I think in the  
9 vein of trying to solve problems, it seems that Exxon believes  
10 that it cannot answer those questions until its expert's  
11 report. I think my expert cannot report properly until we have  
12 answers to those questions. So the government would be content  
13 with either the answer that Exxon can give us now as to what it  
14 thinks it's done to comply with the NCP and at least which of  
15 these projects are projects and which are just cost groups.

16           *THE COURT:* Okay.

17           *MR. ROWE:* Or we could -- I think we're going to have  
18 to alter the schedule a bit anyway. So we could change -- I  
19 know they're opposed to this, but I would suggest anyway that  
20 they might want to go ahead and deliver maybe not all their  
21 expert reports but maybe just that one, and then they would be  
22 able to respond to that discovery and then we could have some  
23 time and have our expert's report.

24           *MR. BUTHOD:* Ty Buthod for Exxon. If I may real  
25 quickly, Judge.

1           *THE COURT:* Yeah.

2           *MR. BUTHOD:* Ty Buthod for ExxonMobil. We oppose any  
3 notion that we would at this stage sort of change the schedule  
4 to have the expert reports staggered. I think the parties and  
5 the Court contemplated this when we set up a deadline in our  
6 original scheduling order for supplemental expert reports. We  
7 would suggest that like in a lot of matters, NCP compliance is  
8 something that experts are going to be opining about, and we  
9 naturally want to defer and say that our response to that is  
10 going to come from our experts' reports. I'm certain that the  
11 government will have an expert say there was not NCP  
12 compliance. And if there's information from our expert reports  
13 they feel like they've got to confront later, that's why they  
14 have a supplemental report deadline already in the DCO.

15           *MR. ROWE:* Your Honor, we --

16           *THE COURT:* So you would propose doing nothing?

17           *MR. BUTHOD:* I would propose doing nothing, but  
18 recognizing they have the right, and we're not quarreling with  
19 this, Judge, they have the right upon receipt of our expert  
20 report, for their expert to file a supplemental report if there  
21 are things in it they have not anticipated and they feel like  
22 they have to address.

23           *MR. STEINWAY:* Your Honor, Dan Steinway for Exxon.  
24 When we originally proposed this case management schedule to  
25 you, you told us to go back to the drawing board, because it

1 was way too long. And so we tried to compress the schedule and  
2 make it a very effective schedule. Both parties went to great  
3 lengths to set up a fair and reasonable schedule. We all  
4 understood the expert reports were due May 23rd and that there  
5 would be opponent reports. So all of this was carefully  
6 considered when we originally proposed the case management  
7 schedule to you, Your Honor. And this is a question that's  
8 typically, as Mr. Buthod has just noted, typically answered by  
9 our experts. We have every inclination to answer the  
10 questions, just as the government will get with their expert,  
11 of what the opinion is. We could say the same thing about the  
12 government. We would like to know what their position is on  
13 these issues. That's why we set up this schedule, so  
14 contemporaneously both experts would provide their opinions and  
15 each party would have the right to reply accordingly, and this  
16 was set up in a very deliberative manner.

17           *MR. ROWE:* Your Honor, Mike Rowe again. Just briefly.  
18 It is true that the government would have preferred to stagger  
19 its schedule for experts, because we think it works better. It  
20 is true that we agreed to simultaneous experts, and that's  
21 still okay with us. What's not okay with us is that we're left  
22 to guess as to what projects Exxon did and then try to sort  
23 out -- I mean, it's almost as though we would waste our first  
24 expert report, because these are their projects after all.  
25 They presumably know what they've been doing since the summer

1 of 1985 at this plant. And it may well be that they're going  
2 to argue that, look, we didn't take any active NCP efforts, but  
3 we did this under RCRA, and we think that's good enough. But  
4 they could at least answer the question and tell us that and  
5 then they tell us what they think the projects are and what  
6 groups they're in and which ones they think would fit as  
7 removal or remedial so that we have something to address.

8 *MR. STEINWAY:* Your Honor, Dan Steinway for Exxon.

9 In 5B of the case management order, the  
10 government will have every right to provide a rebuttal expert  
11 report right on these issues. That's why this schedule was set  
12 up --

13 *THE COURT:* So you want to wait and do it as a  
14 rebuttal expert and not before then?

15 *MR. BUTHOD:* Oh, no, I'm sorry, Judge. Ty Buthod. We  
16 want to do this on the deadline by which we provide our expert  
17 reports.

18 *THE COURT:* All right.

19 *MR. BUTHOD:* The government's opportunity to respond  
20 to it --

21 *THE COURT:* Okay.

22 *MR. BUTHOD:* -- can be done also through a rebuttal  
23 report. But we think it's appropriate when there's an  
24 interrogatory that really calls for, what do your experts  
25 think, our response is simply, Look at the report --

1           *THE COURT:* Look at the report. All right. I think  
2 you're right, Mr. Buthod. Let's see if that is adequate. As  
3 long as there is a full opportunity for the government's  
4 experts to address the arguments and respond, that's fine. And  
5 as long as Exxon recognizes that any effort to pin the experts  
6 down before then will be rejected by the Court.

7           *MR. BUTHOD:* Understood, Judge. Thank you.

8           *THE COURT:* That ought to provide what both parties  
9 need or at least -- even if it's not what you want.

10          *MR. ROWE:* Very well, Your Honor. Mike Rowe.

11                 So I think the remaining issues are, we don't --  
12 we are told by Exxon that they are going to respond to our  
13 questions about government contracts. We don't know when. And  
14 then what will we do with our rapidly decaying pretrial  
15 schedule here?

16          *THE COURT:* It's not decaying as rapidly as you think,  
17 given what I have put into place today and how quickly you are  
18 required to get it done, number one.

19                 Number two, when will Exxon respond to those  
20 questions?

21          *MR. STEINWAY:* Your Honor, Dan Steinway for Exxon.

22                 The government has admittedly asked a very good  
23 question. We are in good faith looking into the contract  
24 question that Mr. Rowe just asked and we are pressing our  
25 client to give us an answer on that and we will proceed very --

1 we have no intention --

2           *THE COURT:* Report to him within one week from today  
3 when an answer will be provided.

4           *MR. STEINWAY:* Yes, Your Honor.

5           *MR. BUTHOD:* We'll do that.

6           *THE COURT:* Okay. That's fair.

7           *MR. ROWE:* And, Your Honor, I understand your point  
8 about this. I didn't mean to just roundly dispose of our  
9 existing schedule, but we do have -- at the moment we're --

10           *THE COURT:* I extend all deadlines 30 days. That  
11 ought to take care of it for now.

12           *MR. ROWE:* Okay. Very well.

13           *THE COURT:* All right?

14           *MR. ROWE:* Yes, ma'am.

15           *THE COURT:* Okay.

16           *MR. ROWE:* Thank you, Judge.

17           *THE COURT:* Thank you all. Have a good weekend.

18           *MR. STEINWAY:* Thank you, Your Honor.

19           *THE COURT:* Bye-bye.

20           *(Concluded at 2:51 p.m.)*

21   \* \* \*

22 I certify that the foregoing is a correct transcript from the  
23 record of proceedings in the above-entitled cause, to the best  
of my ability.

24 /s/ Kathy L. Metzger  
Kathy L. Metzger  
25 Official Court Reporter

8-9-2016  
Date